85-625

Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

NORTHERN CALIFORNIA RETAIL CLERKS UNION AND FOOD EMPLOYERS JOINT PENSION TRUST FUND, a trust fund,

Petitioner,

VS.

AWARD SERVICE, INC.,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether there is implied in ERISA a private right of action by employers to compel the return of contributions allegedly made by mistake to an employee benefit plan where: (1) ERISA does not provide any rights of action of any sort to employers, among its six carefully-integrated civil enforcement provisions; (2) employers are not a class for whose especial benefit ERISA was enacted; and (3) there is nothing in the structure or legislative history of ERISA to suggest an intent by Congress to create such right?

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PARTIES TO THE PROCEEDINGS

There were no parties to the proceedings in the United States Court of Appeals for the Ninth Circuit other than those set forth in the caption of the case before this Court.[1]

OPINIONS BELOW

The District Court's Order is not officially published. It is unofficially published at 101 CCH Lab. Cas. para. 11,026. It is reproduced as Appendix B.

[1] Petitioner will be referred to herein either as "Petitioner" or "Trust Fund." Respondent will be referred to as "Respondent" or "Award Service."

The Court of Appeals issued two opinions, on January 3, 1984 and June 19, 1985. The results reached in both were the same, although the reasoning was changed somewhat. The first opinion, reported unofficially at 102 CCH Lab. Cas. para. 11,317, was withdrawn after withdrawal of the original opinion in *Chase v. Teamsters of Western Conference of Teamsters Fund,* upon which the panel of the court relied in deciding this case. After a new opinion was issued in *Chase,* reported at 753 F.2d 744 (CA9 1985), a new opinion was in turn issued in this case. It is reported at 763 F.2d 1066, 6 BNA Employee Benefit Cases 1843, and is reproduced as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1985. It is reproduced as Appendix C. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. section 1254(1).

STATUTES INVOLVED

The statutes involved in this case are the Employee Retirement Income Security Act of 1974 ("ERISA"), P.L. 93-406, 88 Stat. 832 (1974) and the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), P.L. 96-364, 94 Stat. 1208 (1980). Specifically, ERISA section 403(c)(2)(A) provided, before its amendment in MPPAA:

> "In the case of a contribution which is made by an employer by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution."

88 Stat. at 876. As amended (by section 410 of MPPAA, 94 Stat. at 1308) it provides:

> "In the case of a contribution, or payment of withdrawal liability under part 1 subtitle E of part iv—
>
> '(i) made by the employer to a plan (other than a multiemployer plan) by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the

employer within one year after the payment of the contribution, and

'(ii) made by an employer to a multiemployer plan by a mistake of fact of law (other than a mistake to whether the plan is described in section 401(a) of the Internal Revenue Code of 1954 or the trust which is part of such plan is exempt from taxation under section 501(a) of such Code), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake."

It is codified at 29 U.S.C. Section 1103(c)(2)(A).

Additionally, ERISA Section 502(a), 29 U.S.C. Section 1132(a), provides:

"(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of [section] 105(c);

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates

any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i)."

ERISA section 502(e)(1), 29 U.S.C. section 1132(e)(1), provides:

"Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section."

STATEMENT OF THE CASE

A. Facts

This case comes up from an order dismissing the entire complaint pursuant to Federal Rules of Civil Procedure 12(b). The only facts are those alleged in the complaint. The complaint is reproduced as Appendix D hereto.

Award Service alleged in its complaint that it is an employer engaged in commerce (Appendix D, p. 14), and the Trust Fund is a fund established pursuant to section 302 of the Labor Management Relations Act, 1947 ("LMRA"), 29 U.S.C. section 186 (Appendix D, p. 15). From September, 1970 through March, 1981, Award Service made contributions to the Trust Fund. (Appendix D, p.16.). At all times during this period, Award Service was not a party to any written agreement providing the basis upon which payments were to be made to the Trust Fund. (Appendix D, p. 16). In separate, prior litigation between Award Service and one of the unions which is a sponsor of the Trust Fund, the Superior Court for Santa Clara County, California ruled in 1981 that there was no collective bargaining agreement between the union and Award Service. (Appendix D, p. 15). In 1979, an assignee of the Trust Fund sued Award Service for past

contributions, but the suit was dismissed by the assignee in 1982. (Appendix D, pp. 15-16).

Award Service further alleged that it made demands starting on June 3, 1982 for a return of all the contributions made by it between September, 1970 and March, 1981, on the grounds that the contributions were in violation of LMRA section 302. (Appendix D, p. 16).[2] The Trust Fund at all times rejected Award Service's demand for a refund of its contributions. (Apendix D, p. 17).

B. Procedural History

The complaint was filed on July 14, 1983. It alleged six claims. The first was for declaratory judgment under 28 U.S.C. section 2201; the second was for recovery of contributions under LMRA subsection 302(e), 29 U.S.C. section 186(e); the fourth was under ERISA; and the third, fifth and sixth were under state law. On August 24, 1985, defendant, Petitioner here, moved to dismiss the complaint in its entirety. Award Service opposed the motion. The motion was granted and the complaint was ordered dismissed on October 7, 1985.

With respect to the question raised here, concerning the implication of a private right of action by employers under ERISA, the District Court held:

> "Plaintiff's fifth claim for relief is based on section 403(c) of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. section 1103(c). Section 403(c) does not confer any jurisdiction on this Court. Section 402(c) is part of Title I of ERISA. ERISA section 502, 29 U.S.C. section 1132, provides an extensive and specific list of remedies for violations of Title I of ERISA. No provision is made there for an action by an employer to recover for an alleged violation of section 403(c). Therefore, this Court has no jurisdiction of plaintiff's fifth claim for relief."

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[2] Award Service did not allege that the contributions were made by mistake of either fact or law.

(Appendix B, p. 10). Award Service appealed from the order of dismissal to the Court of Appeals for the Ninth Circuit.

The Court of Appeals reversed the District Court on the ERISA point.[3] It held that there is implied under ERISA a right of action by an employer to compel return of contributions allegedly made by mistake to an employee benefit plan. The court held that such an employer may sue to enforce subparagraph 403(c)(2)(A), which permits a plan to return contributions to an employer where the plan administrator determines that they were made by mistake, as an exception to the general rule in section 403(c) prohibiting plan assets from ever inuring to the benefit of an employer.[4]

The Court of Appeals concluded that there was jurisdiction of such an action either under ERISA section 502(e), 29 U.S.C. section 1132(e) or under general federal question jurisdiction, 28 U.S.C. section 1331.

As to ERISA section 502(e), the court followed *Fentron Industries, Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1304-05 (CA9 1982), where it was held that employers may sue despite their omission from the class of persons expressly empowered to sue under section 502, if they allege a "specific and personal injury." (Appendix A, p. 2).

As to 28 U.S.C. section 1331, the court held that there was jurisdiction to determine in accordance with *Cort v. Ash*, 422 U.S. 66 (1975) whether an implied right of action existed in favor of the employer under ERISA section 403(c)(2), and proceeded to find that there is such a right.

After this Court issued its opinion in *Massachusetts Mutual Life Insurance Company v. Russell*, ____ U.S. ____, 105 S.Ct.

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[3] It affirmed the District Court's dismissal of the employer's other claims, except its state law claims which were dismissed only for lack of pendent federal jurisdiction, a defect cured by finding jurisdiction over the ERISA claim. The state law claims were limited to periods of time before the effective date of ERISA. (Appendix A, p. 8).

[4] Award Service has never alleged that the plan administrator found that it made its contributions by mistake of fact or law.

3085 (June 27, 1985), petitioner moved the Court of Appeal to recall its mandate in this case. The court has not acted on that motion.

ARGUMENT

A. The Implication of Additional Private Rights of Action Under ERISA Is Highly Disfavored, *Massachusetts Mutual v. Russell*

On June 27, 1985, eight days after the second opinion of the Court of Appeals in the instant case was filed, this Court decided the case of *Massachusetts Mutual Life Insurance Co. v. Russell, supra.* In that case, the Court held that "in section 409(a) [of ERISA] Congress did not provide, and did not intend the judiciary to imply, a cause of action for extra-contractual damages caused by improper or untimely processing of benefit claims."

The Court's rationale drastically undermined the basis for the Court of Appeals' ruling that an employer has an implied right of action under ERISA to recover contributions mistakenly made, even though Congress has not provided explicitly such a remedy.

The Court stated:

> "The six carefully-integrated civil enforcement provisions found in section 502(a) of the statute as finally enacted, however, provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute'." (emphasis in original).

105 S.Ct. at 3093.

The Court explained its basic philosophy about the interpretation of ERISA's enforcement scheme:

> "We are reluctant to 'fine-tune' an enforcement scheme crafted with such evident care as the one in ERISA. As we

> stated in *Transamerica Mortgage Advisors, Inc. v. Lewis* (TAMA), 444 U.S. 11, 19 (1979): '[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.' See also *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571-574 (1979). 'The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.' *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S., at 97."

Id.

Massachusetts Mutual v. Russell makes it clear that the judicial implication of additional private rights of action to enforce the provisions of ERISA is disfavored.

The concurring opinion (Brennan, J.) took issue with some of these remarks; but the concurring justices made clear their general support for the proposition that the courts "may not find implied private remedies in ERISA", as opposed to construction of the scope of the remedies Congress *did* provide. *Id.* at 3097.

The approach in *Fentron, supra*, which was relied upon by the Court of Appeals in this case, cannot survive *Massachusetts Mutual.*

B. No Private Right of Action by Employers Can Be Found Implied in ERISA

1. Overview

The Court of Appeals reached its decision in favor of an implied ERISA right of action by employers on the basis of an analysis under *Cort v. Ash, supra.*[5] Aside from the admonitions of this Court in *Massachusetts Mutual, supra*, the *Cort v. Ash* criteria do not support the decision of the court below.

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[5] The factors relevant under this analysis are summarized at fn. 13 in *Massachusetts Mutual, supra.*

2. Employee Benefit Plan Participants and Beneficiaries Are the Class for Whose Especial Benefit ERISA Was Enacted, Not Employers

The class of persons for whose benefit ERISA and MPPAA were enacted is that of participants and beneficiaries of employee benefit plans. *Massachusetts Mutual, supra*, 105 S.Ct. at 3092; *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981); *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361-362 (1980). But the Court of Appeals concluded that "the 1980 amendment to section 403(c)(2)(A), which added subparagraph (ii) concerning payments made by an employer by mistake of fact or law, was clearly designed for the benefit of employers", which the court evidently regarded as satisfaction of the first *Cort v. Ash* criterion. (Appendix A, p. 3).

ERISA section 403 is concerned with the assets of employee benefit plans. Subsection (a) requires generally that plan assets be held in trust, subject to certain exceptions listed in subsection (b). Subsection (c) declares that plan assets shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan", and further provides that "the assets of a plan *shall never inure* to the benefit of any employer." Subsection (d) deals with the disposition of assets upon the termination of a plan.

Paragraphs (2) and (3) of subsection 402(c) state certain exceptions from the general rule prohibiting plan assets from inuring to the benefit of any employer. In question here is subparagraph 403(c)(2)(A), which allows contributions made by mistake to be returned to employers.

As originally enacted, subparagraph 403(c)(2)(A) provided that the general rule that plan assets shall never inure to the benefit of any employer "shall not prohibit" the return of contributions made by a mistake of fact within one year of the payment. No distinction was made between single and multiemployer plans. Nothing was said about who would determine the existence of a mistake. In MPPAA, subparagraph

403(c)(2)(A) was subdivided. Subdivision (i) retained essentially intact the former wording of subparagraph (a), but limited its effect to single employer plans. Subdivision (ii) was made applicable to multiemployer plans, and was completely new. It provides that the general rule of 403(c) "shall not prohibit" the return of contributions to an employer within six months after the plan administrator determines that they were made by a mistake of fact or law.

In the context of this structure, it is not plausible that employers are a class for whose especial benefit Congress intended to enact section 403, either originally or when subsection (c) was amended in 1980. Instead, it is evident that section 403, like the rest of ERISA, was designed for the especial benefit of the class consisting of participants and beneficiaries in employee benefit plans.

The Court of Appeals attempted to satisfy the first *Cort v. Ash* criterion by using an excessively narrow focus on the statute. Instead of looking at ERISA as a whole to determine whether Congress intended the statute for the especial benefit of employers, the court looked only to subsection 403(c). Its vision did not even encompass the entirety of that subsection.

3. There Is No Legislative History to Suggest Congress Intended to Create a Right of Action for Employers Under ERISA Section 403

Award Service and the Court of Appeals did not refer to any legislative history suggesting that Congress intended to create a right of action for employers under ERISA section 403, or under any part of Title I of ERISA, for that matter. Petitioner has found none.

4. The Implied Right to Compel Return of Contributions Is Antagonistic to the Very Statute in Which the Court of Appeals Found It Implied

Where Congress intended to provide rights of actions under ERISA, it expressly provided them, mainly in section 502. This militates strongly against implication of such a right.

The structure of subdivision 403(c)(2)(A)(ii) is also incompatible with finding a right in employers to compel the return of contributions. The possibility of return is expressly made dependent on a determination by the plan administrator that there has been a mistake. Here, no such determination is alleged. This condition on return was unpopular with the Court of Appeals, which thought it left too much power in the hands of the trustee [sic] (Appendix A, p. 3-4), but this is strictly Congress' business. Moreover, and at least as important, nothing in the language of subdivision (ii) suggests that a return of contributions is mandatory, even if the plan administrator determines there was a mistake. It provides only that such a return is "*not prohibited.*"

To convert the permissive language of 403(c)(2)(A)(ii) into a mandatory duty, and then to discard the express condition precedent of a determination by the plan administrator is simply to re-write the statute to suit the court. Far from being consistent with the statute, this graft is antagonistic to the host. It must be rejected.

This is made all the more apparent when ERISA is more broadly viewed. Its careful, interlocking and interdependent system of remedies does not easily allow for the importation of new ones Congress did not provide. *Massachusetts Mutual, supra,* at 3093.

5. The Absence of Conflict With State Law, Which Is in Fact Preempted, Is the Only *Cort v. Ash* Criterion Satisfied Here

The only *Cort v. Ash* criterion satisfied here is the last one, for ERISA preempts virtually all state laws. ERISA section 414(a), 29 U.S.C. section 1144(a); *Massachusetts Mutual, supra,* 105 S.Ct. at 3092. This would be true, of course, for *any* remedy suggested to be implied in ERISA.

6. Summary

Under the *Cort v. Ash* approach, properly applied, there is no implied private right of action for employers under ERISA. ERISA was not enacted for the especial benefit of employers, there is no legislative history intimating a congressional intent

that employers have a right of action not expressly provided for, and the structures of both subdivision 403(c)(2)(A)(ii) and the enforcement provisions of section 502 are inconsistent with the existence of such a right.

C. There Is a Sharp Conflict Between the Ninth and Several Other Circuits on the Question Whether Employers Have an Implied Right of Action Under ERISA

The Ninth Circuit is alone among the circuits in finding implied in ERISA a right of action for employers. The approach in *Fentron, supra*, which was relied upon here, has been rejected and a contrary rule adopted by at least three other circuits. *Tuvia Convalescent Center, Inc. v. Hospital Employees*, 717 F.2d 726, 730 (CA2 1983); *Great Lakes Steel Division v. Deggendorf*, 716 F.2d 1101 (CA6 1983); *U.S. Steel v. Pennsylvania Human Relations Commission*, 669 F.2d 124 (CA3 1982).

In each of these cases, the courts have held that employers do *not* have implied rights of action under ERISA. *See also Pressroom Unions-Printers League Income Security Fund v. Continental Assurance Co.*, 700 F.2d 889, 892 (CA2), certiorari den. ____U.S. ____, 104 S.Ct. 148 (1983).

CONCLUSION

This petition should be granted because the decision below that there is implied in ERISA a private right of action by employers to recover contributions made to an employee benefit fund by mistake is in conflict with this Court's decisions in *Massachusetts Mutual v. Russell* and *Cort v. Ash*, and is in conflict with the decisions of the courts of appeals for the Second, Third and Sixth Circuits.

Respectfully submitted,

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(Appendices follow)

Appendix A

In the United States Court of Appeals
For the Ninth Circuit

CA No. 83-2625
DC No. C-83-3322

Award Service, Inc.,
Plaintiff/Appellant,

vs.

Northern California Retail Clerks Unions and Food Employers Joint Pension Trust Fund, a trust fund,
Defendant/Appellee.

[Filed June 19, 1985]

OPINION

Appeal from the United States District Court
for the Northern District of California
Honorable Robert H. Schnacke, District Judge, Presiding
Argued and Submitted August 10, 1984—San Francisco, California

BEFORE: TANG, CANBY AND BEEZER, CIRCUIT JUDGES.

CANBY, Circuit Judge.

This action arises under section 302(e) of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 186(e), and sections 403(c) and 502(e) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1103(c) and 1132(e). It was brought by Award Service, an "employer" as defined in 29 U.S.C. § 1002(5), against the Northern California Retail Clerks Unions and Food Employers Joint Pension Trust (Pension Trust), a multiemployer pension fund, for recovery of contributions allegedly made to the Pension Trust in violation of section 302(c) of the LMRA.

Award Service alleges that it made contributions to Pension Trust from September 1970 to March 1981 even though it was

not a party to a collective bargaining agreement. On June 3, 1982, Award Service demanded a refund of these contributions on the ground that their payment had violated section 302(c)(5)(B) of the LMRA and that it was consequently illegal for Pension Trust to retain them. Pension Trust, however, refused to refund the allegedly illegal contributions, and this suit was commenced approximately one year later to recover them.

In the district court, Award Service asserted two grounds for restitution of the allegedly illegal contributions. First, it contended that restitution of illegally paid contributions may be ordered under section 302(e) of the LMRA, which grants the federal courts jurisdiction to restrain violations of section 302. Second, it argued that section 403(c)(2)(A) of ERISA confers on employers a right to the refund of contributions made as a result of a mistake of law or fact.

The district court rejected both of these arguments. As to the claim that section 302 confers jurisdiction on the district courts to order restitution of illegally made contributions, the district court read that section as only authorizing a court to restrain future violations of section 302. It therefore concluded that Award Service's section 302 claim for restitution of illegally paid contributions failed to state a claim upon which relief could be granted. As to Award Service's claim that section 403(c)(2)(A) of ERISA created a right to a refund of mistakenly paid contributions, the court found no jurisdictional basis within ERISA for such an action. It therefore dismissed the section 403 claim for lack of subject-matter jurisdiction.

We start with the dismissal of the section 403 claim. The district court correctly observed that section 502 of ERISA does not explicitly authorize a civil action by an employer to enforce the provisions of ERISA. *See* 29 U.S.C. § 1132(a). Nevertheless, we have held that an employer may bring an action under ERISA to enforce its terms where the employer alleges specific and personal injury. *Fentron Industries, Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1304-05 (9th Cir. 1982). The requirement of a specific and personal injury is clearly met here where the employer alleges that it has mistakenly paid more than $167,000 in contributions which it was not obligated to make. The

district court therefore had jurisdiction to entertain the section 403 claim under 29 U.S.C. § 1132(e).[1]

Even if there had been no statutory grant of jurisdiction in ERISA, the district court had jurisdiction under 28 U.S.C. § 1331[2] for the purpose of determining whether an implied cause of action existed under section 403(c)(2)(A) for return of mistakenly paid contributions. *See R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 981 (9th Cir. 1983); *Crown Cork & Seal Co. v. Teamsters Pension Fund*, 549 F. Supp. 307, 310 (E.D. Pa. 1982), *aff'd mem.*, 720 F.2d 661 (3d Cir. 1983).

Having concluded that there is jurisdiction under either 29 U.S.C. § 1132(e) or 28 U.S.C. § 1331, we must next decide whether a right of action exists under section 403(c)(2)(A) of ERISA in favor of an employer for the return of contributions mistakenly paid to Pension Trust. Section 403 confers no such right expressly; it merely *permits* the return of contributions mistakenly paid. We conclude, however, that a right of action is properly implied by section 403 under the standards of *Cort v. Ash*, 422 U.S. 66, 78 (1975). First, the 1980 amendment to section 403(c)(2)(A), which added subparagraph (ii) concerning payments made by an employer by mistake of fact or law, was clearly designed for the benefit of employers. Multi-Employer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 310, 94 Stat. 1208, 1296 (1980). Second, a congressional intent to create a private remedy in favor of the employer is implicit in Section 403(c)(2)(A)(ii). Without such a remedy, the decision to return contributions mistakenly paid would be left solely to the

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[1] Paragraph 1 of this subsection grants the district courts of the United States exclusive jurisdiction over actions brought under ERISA "by the Secretary [of Labor] or by a participant, beneficiary, or fiduciary." 29 U.S.C. § 1132(e)(1). In *Fentron*, we held that employers may sue despite their omission from the class of persons expressly empowered to sue under section 1132. 674 F.2d at 1305 & n.6.

[2] 28 U.S.C. § 1331 confers original jurisdiction upon the district courts over "all civil actions arising under the Constitution, laws, or treaties of the United States."

interested trustee. Third, implying a private right of action furthers the congressional scheme of permitting restitution of contributions paid by mistake when equitable factors militate in favor of such restitution. Finally, no principle of federal-state comity renders a federal cause of action inappropriate; Congress preempted all state law regarding employee pension benefits effective with contributions made after January 1, 1975. 29 U.S.C. § 1144(a); *Martin v. Hamil,* 608 F.2d 725, 729 (7th Cir. 1979).

Our conclusion that section 403 implies a right of action in favor of the employer draws support from *Chase v. Trustees of Western Conference of Teamsters Pension Trust Fund,* 753 F.2d 744 (9th Cir. 1985), decided by this court after this appeal was submitted for decision. *Chase* is distinguishable because it involved a claim for restitution on the part of owner-drivers of taxicabs who were not the "employer" that made the contributions to the pension fund. Our opinion in *Chase* partially relied, however, upon a body of case law authorizing private actions for restitution of mistaken contributions when the equities favor it. *E.g., Peckham v. Board of Trustees,* 719 F.2d 1063, *modified and reaff'd,* 724 F.2d 100 (10th Cir. 1983) (recovery permitted for funds mistakenly paid by participants for their own account; question whether employers *qua* employers have similar right left open); *Teamsters Local 639-Employers Health Trust v. Cassidy Trucking, Inc.,* 646 F.2d 865, 868 (4th Cir. 1981) (district court should determine whether employer is entitled to refund under equitable principles); *E.M. Trucks, Inc. v. Central States, Southeast and Southwest Areas Pension Plan,* 517 F. Supp. 1122 (D. Minn. 1981) (employer should be refunded mistaken contributions if equity requires it); *see also Central States, Southeast and Southwest Areas Pension Plan v. Wholesale Produce Supply Co.,* 478 F. Supp. 884 (D. Minn.), *aff'd,* 611 F.2d 694 (8th Cir. 1979), and *Service Employees International Union Local 82 Labor-Management Trust Fund v. Baucom Janitorial Service, Inc.,* 504 F. Supp. 197 (D.D.C. 1980) (offset allowed to employer for overpaid contributions without consideration of permissive phraseology of section 403(c)(2)(A)); *but see Crown Cork and Seal Co. v. Teamsters Pension Fund of Philadelphia,* 549 F.Supp. 307, 312 (E.D. Pa. 1982), *aff'd mem.* 720 F.2d 661 (3d Cir. 1983) (section 403 (c)(2)(A) permissive only; no implied right

for employer; restitution would threaten integrity of funds). Our conclusion that the employer may sue here is strongly supported by all of these cases except *Crown Cork and Seal*; with it we respectfully disagree.

Finally, as we have already said, our decision in *Fentron*, 674 F.2d 1300, held that an employer injured by interruption of benefits to his employees had standing to enforce the provisions of ERISA. *Id.* at 1305. Similarly, Award Service has standing here to pursue the right to restitution of mistakenly paid contributions under section 403(c)(2)(A).[3] As in *Chase*, however, Award Service will have to establish that the equities favor restitution in order to succeed on the merits. A principal equitable consideration is whether restitution would undermine the financial stability of the plan. *See Chase*, 753 F.2d at 753.

There remains the question whether a similar but perhaps broader cause of action is also recognized by section 302 of the LMRA. We do not find Chase controlling on this issue because in *Chase* the section 302 issue was not raised as such. *Chase* merely decided that nothing in the LMRA precluded us from recognizing a right to the return of mistakenly paid contributions under ERISA. We were not confronted with a claim, as we are here, that section 302 of the LMRA creates a separate and independent cause of action for the return of contributions that violate that

---

[3] Award Service does not indicate whether its section 403 claim arises under part (i) or part (ii) of section 403(c)(2)(A). Part (i), however, does not apply in the case of a multiemployer plan; we assume therefore that Award Service's claim arises under part (ii). That part limits the return of mistakenly paid contributions to the 6-month period following the date the plan administrator determines that a mistake has been made. The record does not indicate whether, and if so when, the plan administrator made that determination. Pension Trust argues that Award Service's request for refund was untimely because it was not made within 6 months of discovery of the mistake. Because a record was not made on this issue and because it was not fully briefed on this appeal, we decline to decide at this stage of the litigation whether a refund of Award Service's contributions would violate the 6-month requirement of § 403(c)(2)(A)(ii).

section. For the reasons that follow we conclude that section 302 creates no such cause of action.

The jurisdiction of the federal courts to enforce section 302 is set forth in section 302(e). 29 U.S.C. § 186(e). That section empowers "[t]he district courts of the United States . . . to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title." One possible reading of that statute is that it merely removes the barrier to injunctive relief that had existed under the Clayton and Norris-LaGuardia Acts, and that it was not intended to deny the federal courts the power to grant other forms of relief. That reading, however, was rejected in *Souza v. Trustees of the Western Conference of Teamsters Pension Trust*, 663 F.2d 942 (9th Cir. 1981), where we said "nowhere is it shown that the section intended to provide anything *more* than injunctive relief." *Id.* at 945. We went on to note the total absence of anything in the legislative history to suggest the availability of ordinary actions at law or of awards of damages. *Id.*[4] Moreover, other courts have uniformly held that jurisdiction under section 302(e) extends only to restraints of future violations, *see, e.g., Bowers v. Moreno*, 520 F.2d 843, 846 (1st Cir. 1975), and does not comprehend actions for damages from violations of section 302, *see, e.g., American Commercial Barge Lines Co. v. Seafarers International Union*, 730 F.2d 327, 332 (5th Cir. 1984). *Accord Sellers v. O'Connell*, 701 F.2d 575, 578 (6th Cir. 1983); *McCaffrey v. Rex Motor Transportation, Inc.*, 672 F.2d 246, 250 (1st Cir. 1982); *Central States, Southeast and Southwest Areas Pension Fund v. Admiral Merchants Motor Freight, Inc.*, 511 F. Supp. 38, 46-47 (D. Minn. 1980), *aff'd sub nom. Central States, Southeast and Southwest Areas Pension*

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[4] In *Souza*, we only addressed the question whether there was a right to a jury trial under section 302. We held that there was not. We did not therefore specifically address the question whether section 302 authorized equitable remedies other than injunctive relief.

Fund v. Jack Cole-Dixie Highway Co., 642 F.2d 1122 (8th Cir. 1981).[5]

Award Service relies on those cases which hold that the district courts have jurisdiction under section 302(e) to determine whether the provisions of a given retirement fund constitute a structural defect in violation of section 302(c)(5). *See, e.g., Ponce v. Construction Laborers Pension Trust*, 628 F.2d 537, 541-42 (9th Cir. 1980); *Wilson v. Board of Trustees*, 564 F.2d 1299, 1300 (9th Cir. 1977). The rationale of those cases, however, is that a structural defect in a pension trust established pursuant to section 302(c)(5) violates the requirement that the trust be used "for the sole and exclusive benefit of the employees." *Elser v. I.A.M. National Pension Fund*, 684 F.2d 648, 652-53 (9th Cir. 1982), *cert. denied*, 104 S.Ct. (1983). There is no allegation here that Pension Trust's refusal to refund Award Service's pension contributions violates the "sole and exclusive" use requirement.

In addition, those cases concern the scope of the jurisdiction granted by section 302(e) and not the remedies it authorizes. Where retroactive pension benefits were awarded, the courts were not compelling restitution. They were merely enforcing the trust in accordance with section 302. In reading section 302(e) as authorizing such jurisdiction, they did not, nor could they, remove the limitation which Congress placed on the exercise of that jurisdiction.

Section 302(c)(5) creates for employee pension funds an exception to the general rule making it unlawful for employers to pay any money or other thing of value to employee representatives. 29 U.S.C. § 186(a). That exception is subject to a number of conditions intended to guard against corruption in the administration of pension funds. *United Mine Workers Health & Retire-*

---

[5] Although this court has previously been confronted by claims for refunds under section 302, we have so far declined to allow such a claim on the ground that a refund under the circumstances of those cases would have violated labor policy. *See, e.g., Carter v. CMTA-Molders & Allied Health and Welfare Trust*, 736 F.2d 1310, 1313 (9th Cir. 1984); *Producers Dairy Delivery Co. v. Western Conference of Teamsters Pension Fund*, 654 F.2d 625, 628 (9th Cir. 1981).

ment Funds v. Robinson, 455 U.S. 562, 570-72 (1982). We are reluctant to tamper with the constraints Congress imposed on the disposition of funds under section 302 by authorizing refunds not guided by any of section 302's restrictions.

In our view the provisions of LMRA and ERISA are best rationalized if we conclude, as we do, that Congress intended to permit trustees to refund improperly paid contributions only where the conditions specified in section 403(c)(2)(A) of ERISA are met. Section 403(c)(2) of ERISA is an exception to the general rule prohibiting plan assets from inuring to the benefit of employers. If pension contributions were refundable under any set of circumstances other than those specifically enumerated in section 403(c)(2), their refund would violate section 403(c)(1). To curb abuse in the use of pension assets, Congress intended to limit the availability of refunds to just those situations described in section 403(c)(2). We refuse to alter the statutory scheme by implying a cause of action under the LMRA for the return of pension contributions which differs from that created by section 403(c)(2)(A) of ERISA.

The dismissal of plaintiff's complaint insofar as it alleges a cause of action under section 403 is reversed. Because the district court's dismissal of the pendent state claims was based entirely upon the dismissal of all federal claims, the dismissal of the pendent claims is also reversed. The case is remanded for further proceedings consistent with this opinion.[6]

REVERSED AND REMANDED.

---

[6] In *Chase*, we also decided that section 403(c)(2)(A) bars the refund of contributions made prior to January 1, 1975. 753 F.2d at 750. Therefore, any cause of action based on that section will not enable Award Service to recover contributions made prior to that date.

Appendix B

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United States District Court
Northern District of California

Case No. C-83-3322 RHS

Award Service, Inc.,
Plaintiff,

vs.

Northern California Retail Clerks Union and Food Employers Joint Pension Trust Fund, a trust fund,
Defendant.

[Filed Oct. 25, 1983]

ORDER

This matter came on for hearing before the Court on October 19, 1983 at 10:00 a.m., on Defendant's Motion to Dismiss. The Court, having the briefs and argument of counsel, has concluded that the Complaint must be dismissed in its entirety.

Plaintiff's second cause of action is alleged to arise under § 302(e) of the Labor Management Relations Act, 1947, 29 U.S.C. § 186(e). Plaintiff seeks a return of contributions made by Plaintiff to Defendant, a trust fund under LMRA § 302(c)(5) 29 U.S.C. § 186(c)(5), which Plaintiff contends were received by Defendant in violation of the requirement in LMRA § 302(c)(5) that employer contributions to a trust fund be made on the basis of a written agreement. LMRA § 302(e) provides only for injunctive relief to remedy violations of § 302, and that subsection does not authorize this Court to order a return to Plaintiff of contributions previously made. *Souza v. Trustees of the Western Conference of Teamsters*, 663 F.2d 942, 945 (CA9 1981). Plaintiff's first

claim, therefore, fails to state a claim on which relief can be granted.

This Court has no jurisdiction over Plaintiff's first claim, for declaratory judgment. The Declaratory Judgments Act, 28 U.S.C. § 2201, does not create any jurisdiction in the federal courts, but is only procedural. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 670, 671-672 (1950). "[T]he availability of such [declaratory] relief presupposes the existence of a judicially remediable right." *Schilling v. Rogers*, 363 U.S. 666, 677 (1970). Plaintiff seeks a judgment declaring that Defendant is obligated to repay the contributions it has received from Plaintiff. The only federal jurisdictional basis referred to in Plaintiff's first claim for relief is § 302(e), but as noted above, Congress limited the power of federal courts when considering alleged violations of LMRA § 302 restraining future violations. It claims no rights under any other federal law, and there is no diversity. Therefore, this Court does not have jurisdiction of Plaintiff's first claim for relief.

Plaintiff's fifth claim for relief is based on § 403(c) of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1103(c). Section 403(c) does not confer any jurisdiction on this Court. Section 403(c) is part of Title I of ERISA. ERISA § 502, 29 U.S.C. § 1132, provides an extensive and specific list of remedies for violations of Title I of ERISA. No provision is made there for an action by an employer to recover for an alleged violation of Section 403(c). Therefore, this Court has no jurisdiction of Plaintiff's fifth claim for relief.

Plaintiff's third, fourth and sixth claims for relief are based in state law. Plaintiff's claims under federal law must be dismissed; therefore, there is no pendant jurisdiction of plaintiff's third, fourth and sixth claims for relief. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

WHEREFORE, IT IS ORDERED, JUDGED AND DECREED that Plaintiff's Complaint is hereby DISMISSED.

Dated: 25 OCT 1983

/s/ ROBERT H. SCHNACKE
Judge, United States District Court

Appendix C

United States Court of Appeals
For the Ninth Circuit

No. 83-2625
DC No. C-83-3322 RHS

Award Service, Inc.,
Plaintiff-Appellant,

vs.

Northern California Retail Clerks Union and Food Employers Pension Trust Fund,
Defendant-Appellee

[Filed July 12, 1985]

APPEAL from the United states District Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United states District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

Appendix D

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Case No. 83 3322
(Labor Relations Pension Fund)

Award Service, Inc.,
Plaintiff,

v.

Northern California Retail Clerks Unions and Food Employers Joint Pension Trust Fund, a trust fund,
Defendant.

[Filed July 14, 1983]

COMPLAINT FOR DECLARATORY RELIEF, RESTITUTION, ACCOUNTING AND DAMAGES

JURISDICTION

I

The jurisdiction of this Court is based upon the existence of a question arising under 29 U.S.C. § 186, a Statute regulating interstate commerce (Labor-Management Relations Act of 1947, as amended); 28 U.S.C. § 1337; and 29 U.S.C. § 1451. The jurisdiction of this Court to grant declaratory relief arises from 28 U.S.C. § 2201.

THE PARTIES

II

Plaintiff, Award Service, Inc., is, and at all times relevant herein was, a corporation incorporated under the laws of the State of California with its principal place of business in the County of Santa Clara, within the Northern District of California. Plaintiff is, and at all times relevant herein has been, engaged in the business of supplying retail outlets with pet supplies, toys and children's books, sewing notions, party goods, hair care products, shoe care products and candles. Its principal place of business is located at 827 North Rengstorff Avenue, in the City of Mountain View, County of Santa Clara, State of California, within the Northern District of California. Plaintiff is an employer engaged in commerce and in operations effecting commerce within the meaning of Sections 2(2), 2(6) and 2(7) of the Labor-Management Relations Act of 1947 as amended [29 U.S.C. §§ 152(2), (6) and (7)].

III

Defendant, NORTHERN CALIFORNIA RETAIL CLERKS UNIONS AND FOOD EMPLOYERS JOINT PENSION TRUST FUND (hereinafter referred to as "Pension Trust") is a trust fund. Plaintiff is informed and believes and on that basis alleges that said Pension Trust is established in accordance with the laws of the State of California with its principal place of business in Walnut Creek, California. Plaintiff is informed and believes and on that basis alleges that Defendant Pension Trust administers the Pension Trust on behalf of employees and former employees located throughout the State of California including employees located within the geographic boundaries of the United States District Court for the Northern District of California. Said Pension Trust is created pursuant to an Agreement and Declaration of Trust, and amendments thereto made as of April 1, 1957. Said Pension Trust is established for the purpose of providing retirement, death and termination benefits to employees represented by local unions affiliated with the United Food and Commercial Workers International Union (Retail

Clerks), AFL-CIO. Said Pension Trust is jointly administered by an equivalent number of Union and Employer Trustees and is subject to the provisions of Section 186 of Title 29 of the United States Code.

FIRST CLAIM FOR RELIEF

IV

On or about March of 1981, the United Food and Commercial Workers Union, Local 428, through its duly authorized representative, filed a Motion to Compel Arbitration against AWARD SERVICE, INC. in the Superior Court in and for the State of California, County of Santa Clara (Case No. 470 163). On May 27, 1981 the Honorable Edward L. Brady in and for the Superior Court of California for the County of Santa Clara, signed an Order which, among other things, stated that "at no time did a collective bargaining agreement and/or agreement exist between AWARD SERVICE, INC., and UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 428 (formerly Retail Clerk's Union, Local 428)". Judge Brady's Order was filed on May 27, 1981. By notice dated July 7, 1981, United Food and Commercial Workers Union, Local 428 appealed the Order of Judge Brady to the Court of Appeal for the First Appellate District. Subsequently, on February 22, 1982, pursuant to the request of the United Food and Commercial Workers Union, Local 428, the Court of Appeal of the State of California in and for the First Appellate District ordered that the appeal therein be dismissed.

V

On May 29, 1979, the Pension Trust through its authorized representative, duly assigned to Mary McAllister by a written instrument a claim which the Pension Trust felt existed against AWARD SERVICE, INC., for past contributions to the Pension Trust. On February 25, 1980, the assignee filed a Complaint on Written Contract (Case No. 444 818) against AWARD SERVICE, INC. in the Superior Court, County of Santa Clara, for, among other things, pension plan contributions from AWARD

SERVICE, INC. which the assignee felt were due and owing under an alleged collective bargaining agreement with United Food and Commercial Workers Union, Local No. 428. On May 19, 1982 counsel for the assignee submitted a written request to the Superior Court of California, County of Santa Clara, requesting that the entire action be dismissed.

VI

Since on or about September of 1970, and continuing to date, Plaintiff has not entered into or in any way maintained any written agreement detailing the basis upon which payments were to be made to the Pension Trust as required by 29 U.S.C. § 186(c).

VII

Commencing on or about September, 1970, and continuing through March 1981, Defendant Pension Trust, has demanded and accepted from Plaintiff contributions to the Pension Trust. Since on or about September, 1970, to on or about March 1981, said contributions totalled at or about $162,679.18. Said contributions were demanded and accepted by the Pension Trust despite the fact that there was no written agreement in effect between it and Plaintiff or between Plaintiff and Local 428 or any other Union regarding or requiring those contributions as required by 29 U.S.C. § 186(c).

VIII

From on or about June 3, 1982, and continuing to date, Plaintiff, AWARD SERVICE, INC., has demanded the return of all contributions remitted to the Pension Trust from on or about September of 1970 to on or about March of 1981. Said demand has been made on the basis that the Pension Trust has accepted and retained such contributions in contravention of the requirements of Section 302 of the Labor-Management Relations Act of 1947, as amended (29 U.S.C. § 186).

IX

From on or about June of 1982 and continuing to date, Defendant, Pension Trust, acting through its authorized representatives and agents, has refused to return all contributions made by Plaintiff to Pension Trust from September 1970 to March 1981, and continues to retain such funds as a result of this refusal.

X

An actual controversy exists between Plaintiff and Defendant affecting their legal rights and duties. Said controversy involves the rights of the parties to the contributions more fully described in Paragraph VII of this Complaint. An actual controversy exists with regard to whether Defendant, Pension Trust, has the legal duty to return contributions to an employer when such contributions were made in the absence of a written agreement between the Employer and the Union, which alleges it represents the employees, comporting with 29 U.S.C. § 186.

SECOND CLAIM FOR RELIEF

XI

The allegations contained in Paragraphs I through IX of this Complaint are incorporated by reference as though fully set forth herein.

XII

Under Section 302(e) of the Labor-Management Relations Act, as amended [29 U.S.C. § 186(e)], this Court has equitable jurisdiction to determine the disposition of funds illegally exacted and paid in violation of Section 302(c) of said Act [29 U.S.C. § 186(c)].

XIII

The acceptance of contributions made by Plaintiff AWARD SERVICE, INC. to the Pension Trust from September 1970 to on or about March 1981 and the continued retention in the

absence of any written agreement detailing the specific bases upon which such payments were to be made, contravened and continue to contravene Section 302 of the Labor-Management Relations Act [29 U.S.C. § 186].

XIV

Defendant Pension Trust now holds approximately $162,679.18 paid by Plaintiff to Pension Trust in the absence of a written agreement comporting with 29 U.S.C. § 186. Those contributions were illegally demanded by and are illegally retained by Defendant Pension Trust. Accordingly, said contributions and total amount should be returned to Plaintiff.

THIRD CLAIM FOR RELIEF

XV

The allegations contained in Paragraphs I through IX of this Complaint are incorporated herein by reference as though fully set forth.

XVI

Jurisdiction for the Third Claim For Relief is additionally conferred upon this Court by virtue of the doctrine of pendent jurisdiction.

XVII

Plaintiff has demanded that the Defendant Pension Trust through its administrator return contributions made to Defendant Pension Trust, and unlawfully accepted and retained by said Pension Trust. Defendant Pension Trust has failed, neglected, and refused to pay said total or any amount thereof to Plaintiff, all to the unjust enrichment of Defendant Pension Trust.

XVIII

The exact amount of the unjust enrichment described above is unknown to Plaintiff at this time, and Plaintiff will ask leave of this Court to amend this Claim for Relief when the amount is ascertained.

FOURTH CLAIM FOR RELIEF

XIX

The allegations contained in Paragraphs I through IX and Paragraphs XV through XVIII of this Complaint are incorporated herein as though fully set forth. Additionally, jurisdiction for the Fourth Claim For Relief is conferred upon this Court by virtue of the doctrine of pendent jurisdiction.

XX

The actions of Defendant Pension Trust in accepting and retaining the funds in contravention of Section 302 of the Labor-Management Relations Act constitutes a conversion of said funds to the use of Defendant Pension Trust.

XXI

As a proximate result of said conversion, Plaintiff has been damaged in the above amount described in Paragraph VII of this Complaint.

XXII

Between on or about June 1982, when Defendant refused to disgorge and therefore did retain said funds, and the filing of this action, Plaintiff has expended approximately five days and $2,500.00 dollars in pursuit of the converted funds, all to plaintiff's further damage of $2,500.00. Said damages increase daily as Plaintiff must expend additional moneys in its efforts to obtain the return of said funds.

FIFTH CLAIM FOR RELIEF

XXIII

The allegations contained in Paragraphs I through IX of this Complaint are incorporated herein as though fully set forth. Additionally, under Section 4301 of the Multiemployer Pension Plan Amendment Act of 1980 [29 U.S.C.A. § 1451], this Court has jurisdiction to grant equitable or legal relief, or both, with respect to the disposition of funds illegally exacted and unlawfully retained by the Pension Trust.

XXIV

Defendant Pension Trust now holds approximately $162,679.18 improperly demanded from and paid by Plaintiff, and continues to illegally retain said funds, and refuses to return said funds to Plaintiff, despite previous demands, in contravention of 29 U.S.C.A. § 1103 of the Employee Retirement Income Security Act of 1974 as amended by the Multiemployer Pension Plan Amendment Act of 1980.

SIXTH CLAIM FOR RELIEF

XXV

The allegations contained in Paragraphs I through IX of this Complaint are incorporated herein as through fully set forth. Additionally, jurisdiction for the Sixth Claim For Relief is conferred upon this Court by virtue of the doctrine of pendent jurisdiction.

XXVI

The actions of Defendant Pension Trust in accepting, retaining, and withholding the funds in contravention of Section 302 of the Labor-Management Relations Act, and 29 U.S.C.A. § 186, requires restitution of said funds under California law.

WHEREFORE, Plaintiff prays:

1. That the Court declare that the Defendant Pension Trust's acceptance and retention of the contributions made by Plaintiff in the absence of a written agreement setting forth the bases on which those payments were to be made violated Section 302(c) of the Labor-Management Relations Act, as amended [29 U.S.C. § 186(c)].

2. That the Court declare that Plaintiff has a legal right to restoration of contributions made to Defendant Pension Trust in the absence of a written agreement prusuant to the provisions of Section 302(c) and (e) of the Labor-Management Relations Act.

3. That the Court order an accounting of all monies collected by Defendant Pension Trust from Plaintiff from on or about September 1970 to on or about March 1981.

4. That the Court order Defendant Pension Trust to make restitution to Plaintiff of the total amount of contributions made by Plaintiff from on or about September 1970 to on or about March 1981.

5. That the Court order Defendant Pension Trust to pay interest to Plaintiff, at the legal rate for all contributions described in Paragraph 4 of the prayer for relief.

6. That the Court order Defendant Pension Trust to pay to Plaintiff income, if any, earned by the Pension Trust on contributions described in Paragraph 4 of said prayer for relief.

7. For reasonable attorneys' fees.

8. For damages for time and money expended in pursuit of the converted funds in the sum of $2,500.00.

9. For Plaintiff's costs of suit herein.

10. For such other and further relief as the Court deems proper.

Dated: July 5, 1983.

Respectfully submitted,

POPELKA, ALLARD, McCOWAN & JONES

By /s/ BERNARD J. ALLARD
Bernard J. Allard

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Supreme Court, U.S.
FILED
DEC 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-625

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

NORTHERN CALIFORNIA RETAIL CLERKS UNION AND FOOD EMPLOYERS JOINT PENSION TRUST FUND, a trust fund,
Petitioner,

VS.

AWARD SERVICE, INC.,
Respondent.

BRIEF OF RESPONDENT AWARD SERVICE, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether an employer has an implied private right of action to enforce the remedies provided by Section 403(c)(2)(A) of ERISA which permits recovery of an employer's mistaken contributions to an employee benefit plan?

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No. 85-625

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

NORTHERN CALIFORNIA RETAIL CLERKS UNION AND FOOD EMPLOYERS JOINT PENSION TRUST FUND, a trust fund,
Petitioner,

vs.

AWARD SERVICE, INC.,
Respondent.

BRIEF OF RESPONDENT AWARD SERVICE, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PARTIES TO THE PROCEEDINGS

There were no parties to the proceedings in the United States Court of Appeals for the Ninth Circuit other than those set forth in the caption of the case before this Court.[1]

[1] Petitioner Northern California Retail Clerks Union and Food Employers Joint Pension Trust Fund will be referred to herein either as "Petitioner" or "Trust Fund." Respondent Award Service, Inc. will be referred to as "Respondent" or "Award Service."

OPINIONS BELOW

The district court's order is not officially published. It is unofficially published at 101 CCH Labor Cases ¶ 11,026. It is reproduced and attached to the Petition as Appendix B.

The Court of Appeals issued two opinions, on January 3, 1985 and June 19, 1985. The decision reached in both were the same, although the reasoning was changed somewhat. The first opinion, reported unofficially at 102 CCH Labor Cases ¶ 11,317, was withdrawn after withdrawal of the Ninth Circuit Court of Appeals opinion in *Chase v. Trustees of Western Conference of Teamsters Pension Fund,* upon which the court partly relied in deciding this case. After a new opinion was issued in *Chase,* reported at 753 F.2d 744 (9th Cir. 1985), a new opinion was in turn issued in this case. It is reported at 763 F.2d 1066, and is reproduced and attached to the Petition as Appendix A.

On or about July 23, 1985, Petitioner filed a motion to recall mandate with the Ninth Circuit. The court denied this motion in an unpublished opinion, titled Order for Publication, dated October 24, 1985. It is reproduced and attached hereto as Appendix E.

JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1985. It is reproduced and attached to the Petition as Appendix C. On July 19, 1985, Petitioner filed a petition for rehearing with the Court of Appeals. The Ninth Circuit has not yet ruled on this petition. Petitioner properly alleges that jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this case are the Employee Retirement Income Security Act of 1974 ("ERISA"), P.L. 93-406, 88 Stat. 832 (1974) and the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), P.L. 96-364, 94 Stat. 1208 (1980). The relevant text and citation of these statutes are correctly set forth in the Trust Fund's Petition.

STATEMENT OF THE CASE

A. Facts.

This case comes up from an order of the United States District Court for the Northern District of California, dismissing Respondent's entire complaint for lack of subject matter jurisdiction. The complaint is reproduced and attached to the Petition as Appendix D.

Award Service, an "employer" as defined in 29 U.S.C. § 1002(5), filed a complaint in the United States District Court for the Northern District of California against the Trust Fund, a multiemployer pension fund, for recovery of contributions made to the Trust Fund in violation of Section 302(c) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 186(c). From September 1970 through March 1981, Award Service made contributions to the Trust Fund (Appendix A, pp. 1-2). At all times during this period, Award Service was not a party to any written agreement providing the basis upon which payments were to be made to the Trust Fund.[2]

On June 3, 1982, Award Service demanded a refund of these contributions on the ground that their payment had violated Section 302(c)(5)(B) of the LMRA and that it was consequently illegal for the Trust Fund to retain them. The Trust Fund, however, refused to refund the allegedly illegal contributions, and Award Service filed suit approximately one year later to recover the contributions (Appendix A, p. 2).

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[2] On or about March 1981, the United Food and Commercial Workers Union, Local 428, one of the unions which is a sponsor of the Trust Fund, filed a motion to compel arbitration against Award Service in the Superior Court of California in and for the County of Santa Clara. On May 27, 1981, the Honorable Edward L. Brady, in and for the Superior Court of California, County of Santa Clara, signed an order which, stated *inter alia*, that "at no time did a collective bargaining agreement and/or agreement exist between Award Service, Inc., and United Food and Commercial Workers Union, Local 428 . . . " (Appendix D, p. 3).

B. Procedural History.

The Respondent's complaint was filed in the United States District Court for the Northern District of California on July 14, 1983. It alleged six claims for relief. The first was for declaratory judgment under 28 U.S.C. § 2201; the second was for recovery of contributions under LMRA section 302, 29 U.S.C. § 186; the third, fourth and sixth claims were under state law seeking restitution; and the fifth claim was under Section 403(c)(2)(A) of ERISA, 29 U.S.C. § 1103(c)(2)(A) (Appendix D).

Petitioner filed a motion to dismiss in the district court. In opposition, Respondent asserted two grounds for the court's jurisdiction to provide restitution of the allegedly illegal contributions. First, it contended that restitution of illegally paid contributions may be ordered under Section 302(e) of the LMRA, which grants federal courts the jurisdiction to restrain violations of Section 302. Second, Award Service argued that Section 403(c)(2)(A) of ERISA confers on employers a right to the refund of contributions made as a result of a mistake of law or fact. The district court rejected both of these arguments and granted Petitioner's motion to dismiss the complaint in its entirety (Appendix A, p. 2).

Award Service appealed the district court's order of dismissal to the Court of Appeals for the Ninth Circuit. The Court of Appeals reversed the district court on the question of subject matter jurisdiction and remanded for further proceedings. First, the court held that ERISA Section 502(e), 29 U.S.C. § 1132(e), expressly conferred jurisdiction on the district court to entertain the claim for relief under ERISA Section 403(c)(2)(A), following *Fentron Industries, Inc. v. National Shopmen Pension Fund,* 674 F.2d 1300 (9th Cir. 1982). Second, the court held that the district court had general federal question jurisdiction, under 28 U.S.C. § 1331, to determine whether an implied right of action exists under ERISA Section 403(c)(2)(A) for return of mistakenly paid contributions (Appendix A, pp. 2-3).

Having concluded that the district court had subject matter jurisdiction, the Court of Appeals proceeded to find that an employer has an implied right of action under ERISA Section

403(c)(2)(A), which provides for the fund to return contributions made under mistake of fact or law, despite omission of employers from the class of persons expressly empowered to sue under ERISA Section 502(a), 29 U.S.C. § 1132(a). Applying the criteria set forth in *Cort v. Ash*, 422 U.S. 66 (1975), the Court of Appeals found that the Multiemployer Pension Plan Amendments Act of 1980, which added subparagraph (ii) to Section 403(c)(2)(A) concerning payments made by an employer under a mistake of fact or law, was designed for the benefit of employers; that ERISA Section 403(c)(2)(A)(ii) implicitly showed a congressional intent to create a right or action in favor of employers; that implying such a right furthers the congressional scheme of permitting restitution of contributions when equity favors such restitution; and that no question of federal-state comity is raised given the preemptive effect of ERISA. Thus, the court held that Award Service did have an implied right of action for restitution of the mistaken contributions under ERISA Section 403(c)(2)(A) (Appendix A, pp. 3-5).

After this Court issued its opinion in *Massachusetts Mutual Life Insurance Co. v. Russell*, ____ U.S. ____, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (June 27, 1985), Petitioner moved the Court of Appeals to recall its mandate in this case. In an Order for Publication, dated October 24, 1985, the Court of Appeals for the Ninth Circuit denied Petitioner's motion, holding that its decision in this case was not inconsistent with *Massachusetts Mutual Life Insurance Co. v. Russell* (Appendix E).[3]

REASONS WHY THE WRIT SHOULD BE DENIED

A. The Ninth Circuit Properly Applied The Criteria Set Forth In *Cort v. Ash* In Determining That An Implied Right Of Action Exists Under ERISA Section 403.

The Ninth Circuit found that an employer's right of action to enforce the remedy provided in Section 403(c)(2)(A)(ii) could

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[3] Petitioner has also petitioned the Court of Appeals for a rehearing. The court has yet to rule on this petition.

be implied in accordance with the criteria established by this Court in *Cort v. Ash,* 422 U.S. 66 (1975) (Appendix A, pp. 3-4).

1. Section 403(c)(2)(A) Was Clearly Designed For The Benefit Of Employers.

ERISA Section 403(c)(1) sets forth the general rule that a plan's assets can never inure to the benefit of an employer. However, prior to the 1980 amendment, Section 403(c)(2)(A) provided a narrow exception, allowing contributions to be returned to the employer if the contributions were made as a result of a mistake of fact. The amendments of 1980 broadened the employer's right so that a trust fund is now permitted to return contributions to an employer which are the result of a mistake of fact *or* a mistake of law. Thus, as the Ninth Circuit found, the 1980 amendment, which broadened the circumstances under which an employer could recover mistaken contributions, was clearly designed for the benefit of employers.

2. Congress' Intent To Create A Private Right Of Action In Favor Of The Employer Is Implicit In Section 403(c)(2)(A).

The legislative history of Section 403(c)(2)(A), as amended, does not evince an express congressional intent to grant a private right of action in favor of an employer. This Court, however, has held that "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available." *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis,* 444 U.S. 11, 18 (1979) (citing, *Cannon v. University of Chicago,* 441 U.S. 677, 694 (1979)).

In *Transamerica Mortgage, id.*, this Court held that a private right of action could be implied into Section 215 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-15, which declared certain contracts void, even though there was no express grant of a private right of action. The Court said:

> In the case of § 215, we conclude that the statutory language itself fairly implies a right to specific and limited relief in a federal court. By declaring certain contracts void, § 215 by its terms necessarily contemplates that the issue of voidness

> under its criteria may be litigated somewhere. At the very least Congress must have assumed that § 215 could be raised defensively in private litigation to preclude the enforcement of an investment advisers contract. But the legal consequences of voidness are typically not so limited. A person with the power to avoid a contract may resort to a court to have the contract rescinded and to obtain restitution of consideration paid.

444 U.S. at 18.

The Court, in *Transamerica,* found that the remedy of rescission, provided by Section 215 necessarily contemplated resort to a judicial forum for enforcement of that remedy. Similarly, in this case, the remedy of restitution provided by Section 403(c)(2)(A), necessarily contemplates resort to a judicial forum for determination and enforcement of the right to restitution of mistaken contributions.

Furthermore, the legislative history of MPPAA, as it appears in the Congressional Record, states in pertinent part:

> [t]he Committees have concluded that a contribution made due to a mistake of law should be eligible for return to the employer if specified conditions are met.

126 Cong. Rec. 20208 (1980). By stating that contributions should be returned "if specified conditions are met," Congress implicitly contemplated that a neutral judicial forum should determine whether "specified conditions are met" for an employer to recover mistaken contributions.

The Ninth Circuit found implicit in Section 403 (c)(2)(A) that Congress intended to create a right of action in favor of an employer to recover for mistaken contributions. As the court realized, "[w]ithout such a remedy, the decision to return contributions mistakenly paid would be left solely to the interested trustee; (Appendix A, pp. 3-4). The issue of whether or not equitable factors militate in favor of returning mistakenly paid contributions should properly be litigated before a judicial forum. *See also Ethridge v. Masonry Contractors, Inc.*, 536 F. Supp. 365, 368 (N.D. Ga. 1982) (court may decide whether mistaken

contributions were made by an employer since a plan administrator would be at liberty to either never make the appropriate determination or determine that no contributions were made by mistake.)

3. A Private Right Of Action In Favor Of Employers Furthers The Congressional Scheme Of Permitting Restitution Of Mistaken Contributions.

The underlying purpose of Section 403(c)(2)(A) is to permit recovery by employers for contributions mistakenly paid. As the Ninth Circuit found, providing an employer with a private right of action to recover mistaken contributions clearly furthers the congressional purpose to permit employers to recover for mistaken contributions when equitable factors militate in favor of such restitution. Indeed, it is the only way of enforcing the employer's right to restitution after a trustee or plan administrator denies the employer's request.

4. Principles Of Federal-State Comity Render A Cause Of Action Appropriate.

The parties do not dispute that the Ninth Circuit correctly found that this criterion was satisfied.

Thus, the Ninth Circuit properly applied the criteria set forth in *Cort v. Ash* and properly held that an employer has an implied private right of action to enforce the remedy provided by Section 403(c)(2)(A) of ERISA.

B. The Ninth Circuit's Ruling Is Consistent With *Massachusetts Mutual v. Russell.*

Petitioner seeks to show a conflict between the Ninth Circuit's decision and this Court's recent decision in *Massachusetts Mutual Life Insurance Co. v. Russell*, ____ U.S. ____, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (June 27, 1985). As the Ninth Circuit made clear in its Order for Publication, the two cases are distinct.

In this case, the issue is whether an employer, who is not expressly covered by ERISA Section 502, has an implied right of action to enforce ERISA Section 403(c)(2)(A), which provides for the return of contributions made under mistake of fact or law. In *Massachusetts Mutual*, the issue was whether a beneficiary,

who is expressly covered by ERISA Section 502, could hold a fiduciary of an employee benefit plan personally liable for extra-contractual damages caused by improper or untimely processing of benefit claims, 87 L. Ed. 2d at 99. This Court ruled that the plaintiff lacked a right of action because the remedies sought, compensatory and punitive damages, were not expressly provided for in "ERISA's interlocking, interrelated, and independent remedial scheme. . . ." 87 L. Ed. 2d at 106. The Court noted that under different circumstances, such as a denial of benefits, the plaintiff "would have had a panoply of remedial devices at her disposal." *Id.*

In contrast, the Ninth Circuit in this case supported its decision with the statutory language of the 1980 amendments to Section 403(c)(2)(A), which added subsection (ii) which permits the remedy sought in this case, return of mistaken contributions. Thus, the Ninth Circuit, in its Order for Publication denying Petitioner's motion to recall mandate, found that its decision was not inconsistent with *Massachusetts Mutual.* In distinguishing *Massachusetts Mutual*, the Ninth Circuit said:

> Our case was quite different. The issue was whether a right of action was to be implied in favor of an employer who had mistakenly paid more than $167,000 into a pension fund. There was no complex and interrelated system of express remedies in ERISA that related to such a claim. There was a positive indication by Congress that mistakenly paid contributions *could* be returned to the contributor because § 403(c)(2)(A)(ii) of ERISA . . . expressly permitted such payments. That remedy was clearly enacted for the benefit of employers who mistakenly made payments to a fund, but there existed no express remedy to effectuate that congressional purpose.

(Appendix E, p. 2; emphasis in original).

Thus, Petitioner's attempt to demonstrate an inconsistency between the Ninth Circuit's decision and the decision of this Court in *Massachusetts Mutual* falls short. The two decisions involved completely different factual circumstances and the

courts did not interpret identical statutory provisions. Therefore, the cases are not in conflict.

C. The Ninth Circuit's Decision Creates No Direct Conflict With Any Cited Circuit Court Of Appeals Decision.

1. The Cases Cited By Petitioner Are Factually Distinct And Do Not Rely For Legal Support On ERISA Section 403.

Petitioner cites several cases in apparent conflict with the Ninth Circuit's decision. However, these cited cases involved different facts and did not address whether an employer's right of action can be implied from Section 403(c)(2)(A) of ERISA, as amended in 1980.

The Third Circuit's decision in *U.S. Steel v. Pennsylvania Human Relations Commission,* 669 F.2d 124 (3d Cir. 1982), and the Sixth Circuit's decision in *Great Lakes Steel Division v. Deggendorf,* 716 F.2d 1101 (6th Cir. 1983), involved the narrow issue of whether an employer has a right of action as a fiduciary under the jurisdictional grant of ERISA Section 502. In *U.S. Steel,* the district court had held that an employer could not be a "fiduciary" within the meaning of Section 502. The Third Circuit reversed, stating:

> Our decision is a narrow one: United States Steel has standing to sue under 29 U.S.C. § 1132(a)(3) as a 'fiduciary,' notwithstanding that it is also an 'employer.'

669 F.2d at 128. In *Deggendorf,* the Sixth Circuit, following the decision in *U.S. Steel,* also held that an employer could sue as a fiduciary under ERISA Section 502. Both courts issued narrow decisions construing the express statutory language of ERISA, Section 502. Neither court addressed the issue of whether there is an implied right of action under any section of ERISA.

Similarly, in *Pressroom Unions-Printers League Income Security Fund v. Continental Assurance Co.,* 700 F.2d 889 (2d Cir. 1983), *cert. denied,* 464 U.S. 845 (1983), the issue was whether a pension fund could assert a cause of action under ERISA against a consulting firm, which was hired by the fund, for breach of its fiduciary duties. In *Tuvia Convalescent Center, Inc. v. Hospital*

Employees, 717 F.2d 726 (2d Cir. 1983) the issue was whether an employer has standing under ERISA to sue the funds for violating their fiduciary duties under ERISA. *Id* at 728. Neither case required the Second Circuit to interpret the meaning and intent of the 1980 amendments to Section 403(c)(2)(A) of ERISA.

In this case, the employer is suing under Section 403(c)(2)(A) of ERISA which, as the Ninth Circuit found, was specifically designed to permit an employer to recover for mistaken contributions. Thus, in construing ERISA as implying a right of action, the Ninth Circuit relied on the meaning and intent of Section 403(c)(2)(A), which was not applicable in the prior judicial decisions which dealt only with Section 502(a)(3).

The Second Circuit in both *Pressmen* and *Tuvia* criticized the Ninth Circuit's holding in *Fentron Industries, Inc. v. National Shopmen Pension Fund,* 674 F.2d 1300 (9th Cir. 1982). The Ninth Circuit relied on *Fentron* in this case to establish that an employer has subject matter jurisdiction under Section 502(e) of ERISA to bring an action if the employer alleges specific and personal injury (Appendix A, p. 3). However, this finding was not essential to the court's holding as the Ninth Circuit also ruled that the district court had subject matter jurisdiction under 28 U.S.C. § 1331. Assuming, *arguendo,* that the district court did not have subject matter jurisdiction under the rationale of *Fentron,* the court still had federal question subject matter jurisdiction over the dispute involving Section 403(c)(2)(A), under 28 U.S.C. § 1331. The issue presented here is whether the Ninth Circuit was correct in implying a right of action under Section 403(c)(2)(A) and not whether the court was correct in relying on *Fentron* or whether the holding of *Fentron* was correct.

2. The Vast Majority Of Cases, On Point, Are Consistent With The Ninth Circuit's Decision.

The Ninth Circuit's decision is consistent with the majority of cases which authorize private causes of action for restitution of mistaken contributions when equitable factors militate in favor of such restitution. *See Teamsters Local 639-Employers Trust Fund v. Cassidy Trucking, Inc.,* 646 F.2d 865, 868 (4th Cir. 1981) (held that the district court should have considered whether employer

was entitled to restitution of mistaken contributions if equity requires); *E.M. Trucks, Inc. v. Central States Southeast and Southwest Areas Pension Plan,* 517 F. Supp. 1122 (D. Minn. 1981) (held that district court could consider whether equitable principles required restitution of mistaken contribution to employer); *Ethridge v. Masonry Contractors, Inc.,* 536 F. Supp. 365, 368 (N.D. Ga. 1982) (held that employer was entitled, under Section 403(c)(2)(A), to set-off of overpayments against underpayments made to benefit plans); *Central States Southeast and Southwest Areas Pension Plan v. Wholesale Produce Supply Co.,* 478 F. Supp. 884 (C.D. Minn.), *affirmed,* 611 F.2d 694 (8th Cir. 1979) and *Service Employees International Union Local 82 Labor-Management Trust Fund v. Baucom Janitorial Service, Inc.,* 504 F. Supp. 197 (D.D.C. 1980) (offset allowed to employer for overpaid contributions without consideration of permissive phraseology of Section 403(c)(2)(A)); *but see, Crown Cork & Seal Co. v. Teamsters Pension Fund of Philadelphia,* 549 F. Supp. 307, 312 (E.D. Pa. 1982), *aff'd mem.,* 720 F.2d 661 (3rd Cir. 1983) (Section 403(c)(2)(A) permissive only; no implied right for employer because restitution could threaten integrity of funds).

To the extent that any disagreement exists in any circuit with the Ninth Circuit's holding or reasoning, such disagreement is, at most, in its infancy. Indeed, only one district court, in a decision affirmed without opinion by the Third Circuit, has reached a contrary opinion. Therefore, it is premature for the Court to decide this issue as a direct conflict between the circuits regarding the interpretation of Section 403(c)(2)(A) is not yet evident.

CONCLUSION

Respondent respectfully submits that this petition for *certiorari* should be denied. The Ninth Circuit's ruling that the employer has a private right of action to recover mistaken contributions under Section 403(c)(2)(A)(ii) of ERISA is consistent with this Court's decisions in *Massachusetts Mutual v. Russell* and *Cort v. Ash*. The Petition evinces no direct conflict between the circuit courts of appeals and, thus, the case does not warrant review.

DATED: December 23, 1985.

Respectfully submitted,

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Appendix E

In the United States Court of Appeals
For the Ninth Circuit

CA No. 83-2625

Award Service, Inc.,
Plaintiff/Appellant,

vs.

Northern California Retail Clerks Union and
Food Employers Joint Pension Trust Fund, a trust fund,
Defendant/Appellees.

[Filed October 24, 1983]

ORDER FOR PUBLICATION

BEFORE: TANG, CANBY AND BEEZER, CIRCUIT JUDGES.

Defendant-Appellee Northern California Retail Clerks Union and Food Employers Joint Pension Trust Fund ("Pension Trust") moves this court to recall its mandate, issued pursuant to our decision in this case, reported at 763 F.2d 1066 (9th Cir. 1985). Pension Trust contends that our decision is undermined by the subsequent decision of the Supreme Court of the United States in *Massachusetts Mutual Life Ins. Co. v. Russell,* 105 S. Ct. 3085 (1985). We reject the contention and deny Pension Trust's motion.

In *Massachusetts Mutual,* the Supreme Court refused to imply a remedy in favor of a beneficiary of an employee benefit plan against a trustee of that plan for untimely processing of a benefit claim. In so doing, the Court indicated that it was reluctant to "fine-tune" the carefully crafted enforcement scheme of the Employee Retirement Income Security Act (ERISA). 53 U.S.L.W. at 4942. The Supreme Court's language and ruling, however, was addressed to the situation before it, in which ERISA provided specifically for various kinds of recovery against a trustee, but only in favor of the plan. *Id.* at 4940. Similarly, ERISA provided various express remedies for a beneficiary, but compensatory and punitive damages against a trustee was not

among them. *Id.* at 4942. Because the text of ERISA, the statutory structure, and the legislative history indicated that Congress intended the judiciary not to imply a cause of action against a trustee for untimely processing of a beneficiary's claim, the Supreme Court refused to imply one. *Id.*

Our case was quite different. The issue was whether a right of action was to be implied in favor of an employer who had mistakenly paid more that $167,000 into a pension fund. There was no complex and interrelated system of express remedies in ERISA that related to such a claim. There was a positive indication by Congress that mistakenly paid contributions *could* be returned to the contributor, because § 403(c)(2)(A)(ii) of ERISA, 29 U.S.C. § 1103(c)(2)(A)(ii), expressly permitted such payments. That remedy was clearly enacted for the benefit of employers who mistakenly made payments to a fund, but there existed no express remedy to effectuate that congressional purpose. *See* 763 F.2d at 1068. It was therefore appropriate, and not inconsistent with *Massachusetts Mutual,* to imply a remedy in favor of the employer under the doctrine of *Cort v. Ash,* 422 U.S. 66 (1975).

The motion to recall the mandate of this court is DENIED.